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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 78

THE UNITED STATES, PETITIONER

v.

AMOS D. CARVER, S. E. TURNER, CLIFFORD N. CARVER ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 13) is reported in 64 Ct. Cls. 1.

JURISDICTION

The original judgment of the Court of Claims was entered January 17, 1927. (R. 7, 12.) Motion for new trial was seasonably filed and entertained and denied, and an amended judgment was entered December 19, 1927. (R. 16.) Petition for certiorari was filed February 25, 1928, and granted

April 23, 1928. (R. 16, 17.) The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

THE QUESTION PRESENTED

Respondents, owners of the ship *Betsy Ross*, had a charter party for carrying a cargo of ore from New Caledonia to the United States. The Shipping Board threatened to requisition the vessel unless the owners would carry wheat for the Food Administration. The owners, rather than have their vessel requisitioned, agreed to carry wheat and entered into a charter party with the Food Administration for a stipulated freight, which was paid. The question here is whether there was a requisition of the vessel or of her use, or a modification or cancellation of a contract for the building, production, or purchase of ships or material within the meaning of the Act of June 15, 1917, so as to entitle the shipowners to just compensation under the Constitution.

THE STATUTES INVOLVED

The Emergency Shipping Act of June 15, 1917 (c. 29, 40 Stat. 182), provides:

> The President is hereby authorized and empowered, within the limits of the amounts herein authorized—
>
> (a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of

the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any

plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: *Provided*, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct.

The Executive Order of July 11, 1917, No. 2664, is as follows:

(Delegating to the Shipping Board and the Emergency Fleet Corporation the powers granted the President by the Emergency shipping legislation.)

By virtue of authority vested in me in the section entitled "Emergency shipping fund" of an act of Congress entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in further-

ance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation, management, and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by the said board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

STATEMENT

The respondents, owners of the sailing vessel *Betsy Ross*, brought this suit in the Court of Claims alleging that the United States Shipping Board, as agent for the President, during April or May, 1918, requisitioned the use of that vessel,

then in the port of Melbourne, Australia, for carrying wheat to the United States, and they sought just compensation under the Constitution by reason of being deprived of the use of the ship. (R. 4–7.)

The findings show that on August 30, 1917, the respondents entered into a charter party for the transportation of lumber by the *Betsy Ross* from British Columbia to Melbourne. Simultaneously with the lumber charter the respondents entered into a charter party with the Mutual Chemical Company of America at New York, which provided that the vessel on her return voyage should transport a cargo of chrome ore from New Caledonia, which is about 800 miles east of Australia, to New York or Baltimore at a stipulated freight, which would have amounted to $177,000. (R. 8, 12.) Following administrative regulations, both charters had the approval of the United States Shipping Board.

The vessel proceeded on her voyage to Australia and arrived at Melbourne March 9, 1918, and between that date and March 27 the ship was discharged of her cargo. She was cleaned and painted, and on April 10, 1918, was ready to sail for New Caledonia to take on her cargo of ore. However, before she sailed her steering gear broke down, which occasioned four days in repairs. (R. 9, Finding VI.) The findings then state that—

> On or about April 5, 1918, certain officials of the United States Shipping Board, and the United States War Industries Board, and of the British and Australian Govern-

> ments, entered upon the discussion of requiring or requesting American-owned vessels, including the *Betsy Ross*, to return to an American port with cargoes of wheat. (R. 9, 10.)

This discussion continued until May 9, 1918. (R. 10.) The master of the *Betsy Ross* applied to the authorities at Melbourne on April 5, 1918, for clearance papers. The Australian authorities declined to grand clearance, advising the respondents' agent at Melbourne that this action was taken at the request of the United States Shipping Board. (R. 10, Finding VIII.)

The respondents' agent at Melbourne rendered bills to the Shipping Board of the Commonwealth of Australia for demurrage, but these bills were disallowed, and a letter from the Commonwealth Shipping Board to the agents of the *Betsy Ross* dated April 17, 1918, stated that a telegram had been received from the Secretary of State, dated April 15, as follows (R. 10):

> With reference to your telegram of 12th April, American Shipping Board consider *Betsy Ross* suitable wheat and requests she loads wheat not chrome ore.

The owners of the *Betsy Ross* made various efforts to have the vessel cleared from Melbourne, but action by the Commonwealth authorities on these requests was delayed until May 9, 1918, pending a decision being reached by the United States Shipping Board that the vessel would be ordered to

abandon her chrome-ore charter and return to the United States with a cargo of wheat. Pending these negotiations the vessel remained idle from April 10, 1918, to May 10, 1918, and the reasonable value of the use of the vessel for that period was $500 per day, or $15,000 in all. (R. 10, 11.)

On May 15, 1918, the owners of the vessel entered into a charter with the United States Food Administration Grain Corporation, at its office in New York, which provided that the *Betsy Ross* should load at Melbourne a cargo of wheat for New York. The charter stipulated that the freight should be at the rate of 125 shillings per ton, with the rate of exchange $4.76 per pound sterling. (R. 11.) The findings state (R. 12):

> At the time of or immediately prior to the signing of said wheat charter plaintiffs, as a result of their negotiations with the United States Food Administration, concluded that rather than have the United States Government take over the *Betsy Ross* said plaintiffs had better sign said wheat charter. This they did on May 15, 1918.

The vessel brought a cargo of wheat to New York and the stipulated freight, amounting to $63,784, was paid by the United States Food Administration and accepted by the owners of the vessel. The claim herein sued upon was then presented to the United States Shipping Board for an award of just compensation, and the claim was disallowed.

The Court of Claims found that "just compensation to the plaintiffs for the cancellation of their contract with the Mutual Chemical Company of America is the sum of $113,216." (R. 12.) That amount was the difference between $177,000, which the vessel would have earned under the terms of its ore charter, and the sum of $63,784, paid by the United States Food Administration as freight on the cargo of wheat. The Court of Claims held that the United States Shipping Board had cancelled the contract which the respondents had with the Mutual Chemical Company of America to transport ore, and awarded judgment to these respondents on that theory. It refused to make any allowance to the respondents for the value of the use of the vessel during the period of 30 days' delay at Melbourne.

SPECIFICATION OF ERROR

The Court of Claims erred in holding that the United States Shipping Board had authority to or had in fact suspended or cancelled the ore charter, and erred in holding that the vessel or her use had been taken so as to entitle the respondents to just compensation.

SUMMARY OF ARGUMENT

The United States did not in fact requisition the vessel, nor requisition her use. Rather than have that done the owners of the vessel preferred to make a contract at a stipulated freight to carry wheat. If the United States had insisted on the use of the

ship for wheat and the owners had stood on their rights and refused the proffered freight rate, compensation for the reasonable value of the use of the vessel might have been obtained, and the value of the use might have been measured by the amount which would have been earned under the ore charter, but when the owners yielded and agreed to the use of the vessel at a stipulated freight no requisition or taking occurred. The theory of the Court of Claims that the United States Shipping Board had suspended and then cancelled the respondents' contract for the carriage of ore overlooks the fact that subdivision (b) of the Act of June 15, 1917, authorized only the modification, suspension, cancellation, or requisitioning of contracts for the building, production, or purchase of ships or material, and the charter for carriage of ore was not such a contract.

ARGUMENT

The theory on which the Court of Claims granted judgment to the respondents was that the United States Shipping Board had cancelled the charter between the owners of the vessel and the Mutual Chemical Company for transportation of ore, and that such cancellation was within the authority granted by the Act of June 15, 1917. The court in its opinion said (R. 15):

> It is not denied that the contract under consideration is within the provisions of the act of June 15, 1917, and that the power and

> authority of the President in relation thereto was duly delegated to the United States Shipping Board Emergency Fleet Corporation.
>
> The act provides for compensation in case the Government shall exercise the power conferred as to suspending and canceling contracts. Having the right to suspend and cancel the contract, it must be held that the Government must pay to the plaintiffs the just compensation for the loss which they incurred by reason of the suspension and cancellation of their contract.

Subdivision (b) of the Act of June 15, 1917, authorized the President—

> To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

Clearly the charter party between the respondents and the Mutual Chemical Company for transportation of ore was not a contract for the building, production, or purchase of ships or material.

Subdivisions (c) and (d) admittedly have no application to this case. Subdivision (c) authorized the President "to purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed * * * or charter of such ship." Under that subdivision the United States Shipping Board had authority to requisition the title to the ship or to requisition merely the use of the ship, or

to requisition the charter of the ship. If the United States had requisitioned the charter, it would have stepped into the shoes of the Mutual Chemical Company, and, by virtue of the charter party which it had taken over, would have required the vessel to transport a cargo of ore from New Caledonia to the United States. That, of course, was not done. (*Union Petroleum S. S. Co.* v *United States*, 18 F. (2d) 752.) If it had been, just compensation would have been payable to the owners of the ore, not to the ship owners. The latter would have received the freight stipulated in the ore charter.

The United States did not requisition the title to the vessel, nor did it requisition the use. It threatened to exercise the power of requisition, but the findings show that the respondents did not want their vessel requisitioned, and to avoid it made a contract to carry wheat at a stipulated freight. Having thus avoided a requisition, they now seek compensation as if requisition had been made.

The case is ruled by *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75. In that case an obligatory order was given which would have amounted to a requisition if the owners had stood on their rights, but, instead, they accepted the price offered and entered into a contract with the United States, and, as the Court said, failed to "save the question of price." That case also held that legal duress could not be found in such a transaction.

Here, the United States did not requisition anything or take anything under the power of eminent domain. The respondents entered into the wheat charter for the very purpose of preventing such action.

The case of *Meyer Scale & Hardware Co.* v. *United States*, 57 Ct. Cls. 26, relied upon by the respondents in their brief in opposition, is not in point. That case dealt with the cancellation by the United States of a contract which it had made for the purchase of equipment for use on Navy vessels, and the power was exercised pursuant to subdivision (b) of the Act of June 15, 1917, which authorized cancellation of contracts for purchase of ships or material. In this case if the United States had requisitioned the use of the vessel, thus preventing the owners from fulfilling their contract to transport ore, there would have been a liability to the owners of the vessel for the value of the use, of which the freight stipulated in the ore charter might have been a measure, but there would have been no cancellation of a contract for the building or production of ships or material, and the United States would not have been liable to the Mutual Chemical Company for interference with its charter. *Omnia Commercial Co., Inc.*, v. *United States*, 261 U. S. 502.

For the value of the use of the vessel for the period of thirty days during which she was delayed at Melbourne, the Court of Claims awarded no recovery, and the respondents did not seek to review

that action in this Court, and there are no findings which would support a judgment against the United States for the value of the use during that period for delaying. The refusal to grant clearance was the act of the Australian Government.

The judgment of the Court of Claims should be reversed.

Respectfully submitted.

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NOVEMBER, 1928.

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